(12)

No. 95-1181

In The

Supreme Court of the United States

October Term, 1995

WILLIAM C. DUNN &
DELTA CONSULTANTS, INC.,

Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Treasury Amendment exempts from CEA regulation "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). The ordinary meaning of "transactions in foreign currency" is "any commercial dealings involving foreign currency." (Pet. Br. 10-11 & n.8) Their exemption from the CEA achieves Congress' purpose (as explained by the Treasury Department, which proposed the Treasury Amendment) not to "confuse an already highly regulated business sector," and to avoid having "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." S. Rep. No. 1131, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888. That interpretation represented the considered position of the United States. (*See, e.g., Amicus Curiae* Brief of the United States in *Salomon Forex*, Pet. App. 10d)

The government – or more accurately, the CFTC – now reverses field, and contends that the CEA regulates foreign currency options. It claims that the ordinary meaning of "transactions in foreign currency" is irrelevant as it employs the "specialized terminology of the CEA" (CFTC Br. 21); however, it actually identifies no such "specialized terminology." Although the CFTC concedes the foregoing congressional purpose, it does not even try to explain how exempting foreign currency futures – while regulating foreign currency options – can be reconciled with such intent.

I.

If the terms of a statute are neither defined nor have an established common-law meaning, they "must be given their ordinary meaning." *Chapman v. United States*, 500 U.S. 453, 461-62 (1991). *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2412 (1995); *Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."); *FDIC v. Meyer*, 114 S. Ct. 996, 1001-02 (1994).

The ordinary meaning of "transactions in foreign currency" is "any commercial dealings involving foreign currency." Both general usage and specialized legal dictionaries define "transactions" to mean commercial dealings, and "in" to mean involving or concerning. (*See* Pet. Br. 10-11 & n.8) As applied to the foreign currency options at issue in this case, the CFTC concedes that the purchase or sale of such an option is a transaction, but insists that it is not a "transaction[ ] *in* foreign currency." (CFTC Br. 33, emphasis in original) The CFTC's objection to the ordinary meaning of "transactions in foreign currency" is patently without merit, for six reasons.

1. The CFTC's sole textual argument[1] – that the purchase or sale of a foreign currency option is not a

[1] The CFTC fails to offer any definition that would exclude "transactions in foreign currency options" from the broader category of "transactions in foreign currency." It criticizes petitioners' analysis as "rest[ing] on a selection of dictionary definitions of the words 'transaction' and 'in' " and "fails to take into account the context in which those words are used here." (CFTC Br. 21; *see id.* at 27-28) However, it fails to offer either a contextual definition of "transactions in foreign currency" that excludes options, or a definition of "in" that

"transaction *in* foreign currency" (CFTC Br. 33; *see id.* at 22, 31, 32, 34) – fails to distinguish between futures (which the CFTC concedes are "transactions in foreign currency") and options (which the CFTC contends are not). Both are contract rights: a future is a contract obligating the seller to deliver at a future date a specific quantity of a given commodity for a fixed price; an option is a contract obligating the seller to deliver at a future date a specific quantity of a given commodity for a fixed price, if the option is exercised. Contrary to the CFTC's contention (CFTC Br. 21), neither futures nor options are "transactions 'in' the commodity itself." However, if a foreign currency future is a transaction *in* the commodity, as the CFTC concedes (CFTC Br. 30), so too must be a foreign currency option.

The CFTC's explanation of the alleged distinction between foreign currency futures and options (*id.*) actually demonstrates that both are transactions "in" foreign currency.

> The [futures] contract's creation of legal obligations respecting the sale and delivery of the

limits "transactions in foreign currency" to transactions in futures, as opposed to those in which the subject matter is foreign currency (including options). Instead, the CFTC attempts to escape the ordinary meaning of the Treasury Amendment by seeking extrinsic indicia of congressional purpose – namely, other sections of the CEA and Congress' alleged "historic practice" (CFTC Br. 33-34). Thus, the CFTC's methodology is flawed: the interpretation of a statute begins with the text. By declining to offer a definition of the text it must construe, the CFTC fails to offer an alternative interpretation to the ordinary meaning of the Treasury Amendment.

> commodity is a "transaction in" the commodity, even if (as is typically true in common experience) the transaction ultimately is extinguished before delivery by entry into an offsetting futures contract.

(*Id.*) The CFTC's reasoning is as applicable to foreign currency options as to futures. Both create "legal obligations respecting the sale and delivery" of foreign currency, and both are "in" foreign currency because that is their subject matter (even though futures and options typically do not cause foreign currency to change hands). Tellingly, even the CFTC's *amici* agree that its futures/options distinction is untenable, and that they must be treated identically for purposes of the Treasury Amendment. (*See Amicus Curiae* Brief of the Board of Trade of the City of Chicago ("CBT Br.") 13; *Amicus Curiae* Brief of the Chicago Mercantile Exchange ("CME Br.") 7-8, 17-18.)[2]

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[2] The CBT and CME disagree with Petitioners and their *amici*, however, and conclude that foreign currency futures and options are both regulated by the CEA. (*See* CBT Br. 10; CME Br. 7-8, 17-18) Such an interpretation is frivolous; if it were correct: (1) the Treasury Department erred in thinking that the amendment it proposed – which Congress adopted virtually verbatim – would "make clear that its [the CEA's] provisions would not be applicable to futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges." S. Rep. No. 1131, 93d Cong., 2d Sess. 51, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5889; (2) Congress enacted a superfluous provision, because the only "transactions in foreign currency" that possibly could be excluded (other than futures and options) are spot and forward contracts – which Congress already had exempted from regulation since 1921 (*see* 7 U.S.C. §§ 1a(11), 2(i); CFTC Br. 30); and (3) it would render meaningless not only the exemptive portion of the Treasury Amendment, but the board-of-trade savings clause as well – which brings under the CEA exchange-traded contracts "for future delivery" (7 U.S.C. § 2(ii)), and would serve no purpose if contracts for future delivery were not within the scope of exemption which it qualifies.

The exchanges suggest that the Treasury Department was "confus[ed]" (CME Br. 23); that Congress enacted a non-"substantive" provision (CBT Br. 19); and that Congress added a provision that was "somewhat unnecessary" (CME Br. 22 n.6). Rather than attribute ignorance and incompetence to the Executive and Legislative Departments, the statute should be construed in accordance with its ordinary meaning – in this case, that the Treasury Amendment excludes all commercial dealings involving foreign currency from regulation under the CEA. If the CBT and CME want legislation to force banks and other institutional investors to trade foreign currency futures and options on their exchanges, their efforts should be directed at Congress and not this Court.

2. The CFTC contends that options contracts – as opposed to futures contracts – are not "transactions in foreign currency" because they confer the "right" but not an "obligation" to "purchase or sell the foreign currency at some future date." (CFTC Br. 21) However, futures contracts do not necessarily impose an "obligation" to "purchase or sell the [commodity] at some future date."

The CFTC previously has held that an instrument may be a futures contract even if it imposes no obligation to purchase or sell the underlying commodity. *See, e.g., Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30,694, 30,694-96, *reprinted in* [1987-90 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,494 at 36,143-45 (July 21, 1989) (applying the CEA to certain instruments which provide for the making of payments based on the value of a commodity). If a purchase or sale obligation were a legal requirement of a futures contract: (1) the safe

harbor relief granted by the CFTC to swaps and hybrid instruments (*see* 17 C.F.R. §§ 35, 34) – which rarely, if ever, involve the purchase or sale of a commodity – would have been unnecessary; and (2) the CFTC would have been barred from approving numerous exchange designations of futures contracts that only permit cash settlements with no obligation to buy or sell the underlying commodity (which in some cases does not even exist – *e.g.*, Eurodollars) at some future date. In authorizing the CFTC to designate contract markets for the sale of securities index futures, Congress required that such index futures be cash settled (and prohibited delivery of the underlying securities). *See* 7 U.S.C. § 2a(ii).

3. The CFTC discusses at great length the history of agricultural options trading in the United States, in an attempt to draw an inference with respect to the Treasury Amendment regarding Congress' alleged "historic practice . . . of regulating options differently, and more strictly, than futures." (CFTC Br. 33-34)[3] However, any such purported *general* practice regarding agricultural commodities has no bearing on Congress' *specific* purpose concerning the treatment of options on non-agricultural commodities – where it clearly elected not to regulate "transactions in foreign currency" – and thus provides no basis for concluding that this phrase excludes options.[4]

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[3] Contrary to the CFTC's contentions (CFTC Br. 26), construing the Treasury Amendment in accordance with its ordinary meaning would create no lacuna in the regulatory arsenal to prevent fraud; it simply would avoid piling-on redundant regulations. (*See* Pet. Br. 6, n.6; *Amicus Curiae* Brief of Crédit Lyonnais ("Banks Br.") 12-14)

[4] The ordinary meaning of the Treasury Amendment unambiguously includes all commercial dealings in foreign currency (including options). In any event, even if it were ambiguous, it still should be construed to include options. As between two inconsistent practices at different levels of generality, the more specific practice (here, exempting "transactions in foreign currency") is preferred to the general (here, regulating agricultural commodity options strictly), as it is closer (and thus more faithful) to the precise issue before the Court. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). In this case, even if Congress consistently regulated agricultural options more strictly than futures, such an historic practice tells nothing about Congress' intention respecting foreign currency options. By contrast, Congress' historic practice regarding foreign currency transactions – which were not regulated before 1974, at which time Congress acted decisively to exempt them (unless they were traded on an organized exchange) – provides a much better indication of its intention to exempt such options from CEA regulation. Congress' historic practice of not subjecting foreign currency transactions to commodities legislation is persuasive evidence that it did not intend to distinguish between foreign currency futures and options – and did not exempt the former, but subject the latter, to regulation under the CEA.

As the CFTC notes, in 1974 there was no established market for trading in options on foreign currency (or for that matter, on many of the newly included non-agricultural commodities). (CFTC Br. 13) Thus, it makes no sense for the CFTC to claim that Congress deliberately chose the words transactions "in" rather than "involving" foreign currency, so as not to include options on foreign currency within the scope of the Treasury Amendment's exclusion. (*See id.* 32) There is no evidence that Congress was concerned with distinguishing between futures and options "transactions in foreign currency" when it chose the particular words of the Treasury Amendment. (*Id.* 33-34)

4. In light of the Treasury Amendment's legislative purpose and all-inclusive language, Congress clearly used this broad phrase to cover any type of trading in the commodities listed in the Treasury Amendment, including options. There is no rational explanation for Congress to have used the preposition "in" to draw such a critical regulatory distinction – rather than straightforwardly limit the Treasury Amendment to "transactions in foreign currency futures."[5] Instead, such a contention ignores the reason for the coexistence of the different, but synonymous, prepositions "in" and "involving" – namely the existence of different authors for the two provisions, the original drafter(s) of H.R. 13111 in the House and the Treasury Department.[6]

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[5] The CFTC's statutory language analysis erroneously claims that "[t]he CEA's provisions are quite consistent in either referring to options expressly, or using more encompassing terminology than transactions 'in' a commodity, when referring to commodity options." (CFTC Br. 33) To the contrary, in the one place in the CEA where Congress directly addressed options in foreign currency, it used the word "in." *See* 7 U.S.C. § 6c(f) ("transaction *in* an option on foreign currency").

[6] The section of the CEA that uses the terms "transactions involving" any commodity (7 U.S.C. § 6c(b)) originated as § 402(iii) of H.R. 13113 (93rd Cong., 2d Sess.), which the House of Representatives passed on April 11, 1974. *See* 120 Cong. Rec. 10,769 (1974). The Senate Committee on Agriculture and Forestry, to which H.R. 13111 was referred, completed hearings on the House bill (and three related Senate bills) on May 22, 1994. *See* S. Rep. No. 1131, at 20, *reprinted in* 1974 U.S.C.C.A.N. at 5860. The Treasury Department proposed what became known as the Treasury Amendment in a letter to the Senate Committee on July 30, 1994. *See id.* at 49-51 (reproducing letter), *reprinted in* 1974 U.S.C.C.A.N. at 5887-89. The Senate Committee, in its executive mark-up on August 7 and 8, 1974, left unchanged the "transactions involving" language from

5. The Treasury Amendment exempts "transactions in foreign currency" and other specified financial instruments from CEA regulation – with a savings clause that brings back those transactions conducted on a board of trade. Rather than creating an anomaly (CFTC Br. 35-36),[7]

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§ 402(iii) of H.R. 13113, but amended § 201 of the House bill (the jurisdictional provision, which appeared 44 pages earlier) by adding the Treasury Amendment – using precisely the "transactions in" language proposed by the Treasury Department. *Compare* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 402(iii) (Apr. 22, 1974) (House passed bill as referred to the Senate Committee on Agriculture and Forestry), *with* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 302(c) (Aug. 29, 1974) (Senate floor bill); *see* S. Rep. No. 1131, at 6, 9, 23, 26 (confirming retention of House-passed provisions with addition of the Treasury Amendment), *reprinted in* 1974 U.S.C.C.A.N. at 5848, 5850, 5863, 5866. The Conference Committee renumbered the section in which the "transactions involving" language appears (from § 302(c) to § 402(c)), but left that provision and the jurisdictional provision substantively unchanged from the Senate-passed bill. *Compare* H.R. 13113, 93d Cong., 2d Sess. §§ 201, 302(c) (Senate floor bill), *with* H.R. Rep. No. 1383, 93d Cong., 2d Sess. 9, 27 (reprinting H.R. 13111, 93d Cong., 2d Sess. §§ 201, 402(c) as passed by Congress); *see id.* at 35, 40 (1974) (Joint Explanatory Statement of the Committee of Conference confirming retention of Senate-passed provisions, including the Treasury Amendment), *reprinted in* 1974 U.S.C.C.A.N. 5897, 5901-02.

[7] Limiting "transactions in foreign currency" to futures would not cure the CFTC's alleged anomaly (i.e., that including options within that phrase would conflict with the savings clause), because at least three of the other financial instruments exempt from CEA regulation by the Treasury Amendment are options which could not be regulated under (the CFTC's interpretation of) the savings clause. As the CFTC correctly notes (CFTC Br. 31 & n.*), security warrants, security rights, and repurchase options either are or include options. If the CFTC is

the language of that savings clause provides further support for the interpretation that "transactions in foreign currency" includes options.

The CFTC recognizes (*id.* 28) that the language of the Treasury Amendment's savings clause ("transactions involv[ing] the sale thereof for future delivery") is nearly identical to that of the CFTC's jurisdictional grant under § 2(i) ("transactions involving contracts of sale of a commodity for future delivery"). Attempting to overcome the obvious conclusion that both apply to futures and options (and, therefore, that "transactions in foreign currency" that precedes the savings clause in the Treasury Amendment also covers futures and options), the CFTC speciously argues that: (a) its regulatory authority over commodity options arises under § 6c(b), rather than § 2(i);[8] and (b) § 2(i) only refers to options on futures contracts, but not options on a commodity itself. (*Id.* 28-29)

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correct that the savings clause is limited to futures contracts, then Congress simply did not regulate options differently, and more strictly than, futures in the Treasury Amendment. The CFTC's narrow interpretation of the savings clause (which it would presumably abandon in another case for a broader construction that included exchange-traded options) illustrates yet again the danger of interpreting a text by reference to an alleged "historic practice" (*id.* 33-34; *see id.* at 22), and then imposing that interpretation on the statutory text regardless of how ill it fits.

[8] The CFTC contends that § 2(i)'s grant of exclusive *jurisdiction* to the CFTC over "transactions involving contracts of sale for future delivery" of a commodity extends only to futures contracts and options thereon (but not to commodity options), while claiming that § 6c "gives the CFTC *additional* (albeit nonexclusive) *authority* over options," including options on the commodity itself. (CFTC Br. 29, emphasis supplied)

a. The CFTC cannot have the *authority* to regulate an instrument with respect to which it does not have express *jurisdiction*. *See Interstate Commerce Commission v. Texas*, 479 U.S. 450, 455-56 & n.9 (1987). Thus, it cannot validly claim that § 2(i) does not confer CFTC jurisdiction over commodity option transactions, while also asserting that § 6c(b) gives it "additional" authority to regulate such transactions. Instead, CFTC authority to prohibit or permit option trading under § 6c(b) extends only to an option "transaction involving any commodity regulated under this chapter" – *i.e.*, those over which the CFTC already has jurisdiction. Accordingly, the CFTC's jurisdiction over commodity options, including off-exchange foreign currency options, must come from § 2(i) – the CEA's jurisdictional grant.[9]

b. In describing the CFTC's "[e]xclusive jurisdiction over futures trading" under § 2(i), the Senate Report states that "the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options." *See* S. Rep. No. 1131 at 6, *reprinted in* 1974 U.S.C.C.A.N. at 5848. By using the same terms (commodity "accounts" and

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[9] The Courts of Appeals for both the Second and Seventh Circuits have recognized that the CFTC's exclusive jurisdiction extends to commodity options. *See CFTC v. American Board of Trade*, 803 F.2d 1242, 1248 (2d Cir. 1986); *Board of Trade of Chicago v. SEC*, 677 F.2d 1137, 1146-47 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). In particular, the Seventh Circuit found § 2(i)'s reference to "transactions involving contracts of sale for future delivery of a commodity" to be broad enough to confer jurisdiction to the CFTC over commodity options as well as futures contracts.

"agreements") in the legislative history as appear in § 2(i), it is fair to conclude that the phrase that follows in § 2(i) ("transactions involving contracts of sale of a commodity for future delivery") was intended to include commodity "options" (the phrase that follows in the legislative history).

Thus, contrary to the CFTC's assertions (upon which its entire statutory analysis depends), the phrase in § 2(i) (i.e., "transactions involving contracts of sale of a commodity for future delivery") includes option transactions[10] – thereby providing it with jurisdiction over commodity options.[11] Similarly, despite the CFTC's

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[10] Even if § 2(i) were construed not to cover commodity options, the reference in the Treasury Amendment's board of trade provision is not constrained to transactions involving "contracts of sale," but applies to transactions involving the "sale" of a commodity for future delivery. Thus, even under the CFTC's statutory construction, where "transactions involving contracts of sale of a commodity for future delivery" refers only to futures contracts, the board of trade provision is obviously worded more broadly to embrace options transactions (which create obligations involving the "sale" of a commodity, if not an actual "contract of sale").

[11] That the Treasury Amendment was intended to remove from CFTC jurisdiction *all* transactions in foreign currency, including options, is evident from the juxtaposition of language in the Senate Report. *See* Pet. Br. 19 (noting that S. Rep. No. 1131, at 31, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5870, stated at the conclusion of its description of what "would be regulated" under the amended CEA, that: "The Commission will have exclusive jurisdiction over *options trading in commodities* (but not in securities). However, *transactions in foreign currency* . . . would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade.")

unsupported assertion (CFTC Br. 35), the savings clause does not "clearly" apply only to futures; instead, the virtually identical language in the Treasury Amendment (i.e., "transactions involv[ing] the sale thereof for future delivery") also covers both futures and options transactions. Therefore, the phrase "transactions in foreign currency," and the Treasury Amendment itself, also must include both futures and options transactions. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994) (concluding that the Treasury Amendment's savings clause must be no broader than its preceding clause).

6. Contrary to the CFTC's contentions (CFTC Br. 36-37), construing the Treasury Amendment to exempt off-exchange foreign currency options from CEA regulation does not render superfluous 7 U.S.C. § 6c(f) – which was added in 1982 to apportion jurisdiction over financial instruments between the CFTC and the SEC. In enacting the Shad-Johnson Accord in 1982, Congress added this section to clarify that the CFTC's exclusive jurisdiction did not extend to options traded on a national securities exchange, which instead fell within the jurisdiction of the SEC. (*See also* 15 U.S.C. § 78i(g)) In this respect, § 6c(f) only removed one particular type of board of trade, a national securities exchange, from the CFTC's exclusive jurisdiction.

The CFTC concedes (CFTC Br. 36), that § 6c(f) "does not expressly grant any jurisdiction to the CFTC." More importantly, § 6c(f) implies only that *on*-exchange foreign currency options (on exchanges other than national securities exchanges) are regulated by the CEA, not that *off*-exchange options (such as those at issue in this case) are

subject to such regulation. The legislative history gathered by the CFTC, which is admittedly vague, discusses the CFTC's regulation of exchange-traded foreign currency options. *See* H. R. Rep. No. 565, 97th Cong., 2d Sess., Pt. 1, at 38 (1982) ("the CFTC will have jurisdiction to regulate the trading of options on foreign currency in the commodities markets"). Since it is undisputed that the CFTC has authority to regulate *on*-exchange foreign currency options, § 6c(f) is not rendered superfluous by properly construing the Treasury Amendment to exempt such *off*-exchange transactions. (CFTC Br. 37)[12]

II.

The Treasury Amendment must be interpreted in light of its congressional purpose, as indicated by the broad and unqualified language of the Treasury Amendment, to exclude CEA regulation and promote efficiency in the *entire* foreign exchange market. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 50-51, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888-89 (emphasis added); 7 U.S.C. § 2(ii). The Treasury Department's proposal to exempt "transactions in foreign currency," and Congress' adoption of that proposal, was intended to exempt *all*

[12] Contrary to the suggestions of the Association *amici*, this Court should not remand for further factual determinations regarding the "board of trade" issue. (*See Amicus Curiae* Brief of the Foreign Exchange Committee at 25-27) That question is not presented to this Court, and the CFTC has not disputed that Petitioners traded *off*-exchange. (*See* Pet. Br. 5 n. 5) Therefore, the issue before this Court is whether the Treasury Amendment excludes from CFTC jurisdiction *all* transactions in foreign currency – an issue based solely on statutory interpretation (without any further required fact finding).

commercial dealings involving foreign currency. The CFTC's suggestion (CFTC Br. 31; *see id.* at 36) that "Congress would have included foreign currency options" by name in the Treasury Amendment "if that was its intention," is without merit.

If Congress intended to exempt then-unknown foreign currency transactions (in addition to futures transactions), it either could attempt to list these unknown transactions by name, or it could exempt the entire category of such transactions. Although the Treasury Department specifically discussed only one type of transaction in foreign currency – foreign currency futures (*see* CFTC Br. 40), its proposal (and Congress' adoption) of language exempting "transactions in foreign currency" generally, rather than "transactions in foreign currency futures" specially, only can be understood as exempting *all* foreign currency transactions (futures, options, and others) from CEA regulation. Since it is difficult to foretell the future of dynamic financial markets[13] (and since economy of language is a virtue), Congress cannot properly be penalized for adopting the more concise – and effective – of two verbal formulations. Indeed, as contemplated by Congress, since the enactment of the Treasury Amendment, the foreign currency markets have grown[14] – not

[13] Congress' intent that the 1974 amendments to the CEA would embrace future developments in the commodity markets also is evidenced by its expansion of the definition of "commodity" to include "all services, rights, and interest in which contracts for future delivery are presently *or in the future dealt in*." *See* § 1a(3) (emphasis added)

[14] *See Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39,188, *reprinted in* [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,925 (Sept. 25, 1990)

only in trading in futures, but also in off-exchange options – all of which are included within the appropriately broadly phrased jurisdictional exemption for "transactions in foreign currency."[15]

Finally, the Treasury Department ("which is responsible for managing the international financial policy of the United States," CFTC Br. 25), and the money-center banks (which play a critical role in implementing that policy,

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(where the CFTC interpreted the CEA's cash forward exclusion, 7 U.S.C. § 1a(11), to apply to transactions that did not exist at the time the provision was passed, but were deemed to fit within the purpose of the exclusion).

[15] Even where a particular result may not have been specifically contemplated at the time a statute was enacted, the legislature nevertheless may have "designed the statute to cover numerous [matters] not specifically within its contemplation." *Agency Holding Corp. v. Mallei-Duff & Assocs.*, 483 U.S. 143, 159 (1987) (concurring opinion, Scalia, J.) (citing reasoning in *McCluny v. Silliman*, 3 Pet. 270 (1830) *See, e.g., Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."); *Kosak v. United States*, 465 U.S. 848, 855-61 (1984) (expansively interpreting a statutory exception to liability under the Federal Tort Claims Act in light of the broad legislative goals of excluding "certain government activities" from liability and threat of suit). In contrast, the case on which the CFTC relies, *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1780 (1995), stands only for the basic principle that an exception to a broad statutory scheme should not be interpreted expansively, where to do so would undermine the purpose of the statute. Here, however, a broad interpretation of the Treasury Amendment, in light of the expansion of the CEA's jurisdiction in 1974, is consistent with the language and purpose of Congress to protect the off-exchange foreign currency markets from any potential adverse impact of regulatory interference.

Banks Br. 2), agree that construing foreign currency options to be outside the Treasury Amendment – and therefore regulated by the CEA – could drive off-shore the daily $40 billion market for foreign currency options (to London and other competing financial centers), or onto organized exchanges, such as the CFTC's *amici* (which already are avoided because of their relatively inflexible terms, high transaction costs, and lack of liquidity). (*See* CFTC Br. 25; Banks Br. 2, 16)[16]

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[16] It is no answer for the CFTC to assert (CFTC Br. 26), that "it may find that it is appropriate to exempt those transactions that are of concern to the Treasury Department and the various amici that have filed briefs in support of petitioners." However, the method by which "this exemption might apply to most foreign currency options traded in the OTC currency market is far from clear." (Banks Br. 15) (*See generally id.* 14-16, describing these limited and ambiguous exemptions) The CFTC's largely unexercised authority to exempt transactions in foreign currency options from CEA regulation (7 U.S.C. §§ 6(c), 6c(b)), is thus no substitute for the Treasury Amendment's automatic statutory exclusion. Congress adopted that Amendment (in the words of the Treasury Department, which proposed it), to ensure that the CEA did not "have an adverse impact on the usefulness and efficiency of foreign exchange market for traders and investors." S. Rep. No. 1131, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S.C.C.A.N. 5843, 5887. The CFTC has not generally exempted transactions in foreign currency options, has not proposed and does not necessarily see the need for such an exemption (*see* CFTC Br. 49, describing the "perception of the need for an exemption"), and is unlikely to appreciate such a need, since its mission does not extend to international financial policy.

III.

The Solicitor General does not request deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) for the CFTC's interpretation of the Treasury Amendment. (CFTC Br. 48) Indeed, in this case, such deference is not only unnecessary, but inappropriate – due to the CFTC's inconsistent interpretations over the last 20 years. (*See* Pet. Br. 23-24 n.16, collecting cases)[17]

Since its creation in 1974, the CFTC has held three inconsistent interpretations of the Treasury Amendment. First, in 1975, the CFTC agreed with the Treasury Department that the Treasury Amendment excludes from CEA regulation all off-exchange foreign currency transactions. (*See* Pet. Br. 22 n.15, which has not been contested by the CFTC). However, by 1985, the CFTC qualified that interpretation, and declared that the Treasury Amendment excludes from CEA regulation "certain off-exchange

[17] Moreover, even if the CFTC consistently had interpreted the Treasury Amendment to distinguish between foreign currency futures and options, it still would not merit *Chevron* deference because both the CFTC and the Treasury Department have policy-making authority with respect to foreign currency options, and their positions conflict. Although the CFTC regulates futures markets, the Treasury Department is responsible for the Nation's "international financial policy." (CFTC Br. 25; *see* 31 U.S.C. § 321(b)(1)) The Treasury Amendment thus marks the boundary between two agencies. Since each agency has policymaking authority and can issue interpretations that potentially merit *Chevron* deference, the interpretative question cannot be resolved simply by deferring to one of the two conflicting interpretations. *Cf. Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 152-54 (1991).

transactions in foreign currencies and other enumerated financial instruments," but "only when such transactions are entered into by and between banks and certain other sophisticated and informed institutional participants." *Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42,983, 42,984, *reprinted in* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750 at 31,122 (Oct. 23, 1985); *see id.* at 42,983-85 & n. 13; ¶ 22,750 at 31,122-24 & n. 13. This also was the CFTC's position in the Fourth Circuit in *Salomon Forex*[18] and in the Second Circuit below.[19] Indeed, this was its position as recently as June 12 of this year, *after* this Court had granted certiorari. *See CFTC Interpretative Letter No. 96-55*, [Current] Comm. Fut. L. Rep. (CCH) ¶26,760, at 44,150-51 (1996) ("The Commission continues to adhere to such interpretative position.").

Now, for the first time in its brief to this Court, the CFTC contends that all futures – even those traded by "unsophisticated" parties – are included within the Treasury Amendment, and are therefore exempt from CEA regulation. (*See* CFTC Br. 30: "The Treasury Amendment's

[18] *See Amicus Curiae* Brief of the CFTC in *Salomon Forex*, 9-10 ("Congress adopted the [Treasury] Amendment in order to exclude transactions between sophisticated and informed institutions that ordinarily trade in the enumerated financial instruments"); *see also id.* at 17.

[19] *See* Brief of Plaintiff-Appellee CFTC in *CFTC v. Dunn*, No. 94-6197 (2d Cir. Sept. 12, 1994) at 19, n. 19 ("the CFTC's longstanding interpretation of [the] Treasury Amendment with respect to futures contracts" is that it "exclude[d] from the ambit of the Act only transactions by and between banks and certain other sophisticated, informed institutions"); *see also id.* at 27, 29.

reference to 'transactions in foreign currency' clearly excludes foreign currency futures contracts from CEA regulation unless they are conducted on a board of trade.") The CFTC's litigating position in this Court is not the kind of consistent agency interpretation entitled to *Chevron* deference. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Since the CFTC's litigation position in this Court does not merit *Chevron* deference, the question before the Court is simply which party offers the better interpretation of the Treasury Amendment. The pertinent terms of the Treasury Amendment are not defined by the statute and have no established common-law meaning. Accordingly, the ordinary meaning of the text should control: "transactions in foreign currency" means "all commercial dealings involving foreign currency" (including options).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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